

FILED BY CLERK

DEC -1 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DELMASTRO & EELLS, an Arizona)	
corporation,)	2 CA-CV 2011-0082
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
BANK OF ARIZONA, N.A., a national)	Appellate Procedure
banking association,)	
)	
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20091855

Honorable Kenneth Lee, Judge

AFFIRMED

Berens, Kozub, Kloberdanz & Blonstein, PLC
By William A. Kozub and Richard W. Hundley

Phoenix
Attorneys for Plaintiff/Appellant

Engleman Berger, P.C.
By Kevin M. Judiscak and Scott Hulbert

Phoenix
Attorneys for Defendant/Appellee

B R A M M E R, Judge.

¶1 Appellant Delmastro & Eells, Inc. (Delmastro) appeals from the trial court's grant of summary judgment in favor of appellee Bank of Arizona, N.A.

Delmastro argues the court erred in determining its mechanic's lien and lis pendens recorded against Bank of Arizona's property were invalid. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). On April 20, 2007, Bank of Arizona purchased a commercial block of property from Venture Development Group (VDG) known as "Block Two" in the Riverside Crossing III Complex (Riverside) located at 2190 West River Road, Tucson, Arizona. The parties recorded a special warranty deed for the property on September 19, 2007. On January 8, 2008 Delmastro entered into a contract with VDG for the construction of a child care center on "Block One" in Riverside. It began construction on January 14, 2008.

¶3 In January, June, and October, 2008, Delmastro sent VDG preliminary twenty-day notices pursuant to A.R.S. § 33-992.01. Each of these notices stated Delmastro had provided "materials and/or labor" for a "building, structure, or improvement" located at "2190 W River Road" for a parcel "legally described as . . . Tutor Time Child Care." Delmastro concedes Bank of Arizona was neither named in the notices nor served with any preliminary notice.

¶4 Delmastro recorded a notice and claim of lien against all property at 2190 West River Road pursuant to A.R.S. § 33-993, naming only VDG as the owner of the property and serving only VDG with a copy of the notice and claim of lien. Then

Delmastro recorded a lis pendens against all properties in Riverside and filed a complaint to foreclose its lien. Bank of Arizona contended it first received notice of the lien against its property when it was served with Delmastro's second amended complaint.

¶5 Bank of Arizona filed a motion for summary judgment asserting the preliminary twenty-day notices and lien were invalid because (1) Delmastro failed to serve Bank of Arizona as required by § 33-992.01(B), (2) the notices did not describe adequately the jobsite and work performed as required by § 33-992.01(C), (3) Bank of Arizona was not named as a property owner in the notice and claim of lien as required by § 33-993, and (4) the notice and claim of lien did not apportion the value of the labor or materials provided. The trial court granted the motion for summary judgment and this appeal followed.

Discussion

¶6 Bank of Arizona's motion for summary judgment was based on deficiencies in Delmastro's preliminary twenty-day notices and its lien that Delmastro acknowledges formed the basis for the trial court's ruling. However, Delmastro has failed to provide adequate citation to these documents in its argument. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"). And although Delmastro's statement of facts contains some citation to the record, it largely refers to an appendix to its opening brief. *See* Ariz. R. Civ. App. P. 13(a)(4). Citations to the appendix do not substitute for proper citation to the record; therefore, it would be appropriate for us to find Delmastro's arguments, which relate solely to the preliminary twenty-day notices and lien, waived. *See Ritchie v.*

Krasner, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (claims unsupported by authority or citation to record waived on appeal).

¶7 Moreover, Delmastro concedes this appeal presents the identical issues we resolved on nearly identical facts, involving the same twenty-day notice and lien documents, in *Delmastro & Eells v. Taco Bell Corp.*, 619 Ariz. Adv. Rep. 7 (Ct. App. Oct. 21, 2011). There we affirmed the trial court's grant of summary judgment against Delmastro and determined invalid the preliminary twenty-day notices and lien also at issue here. *Id.* ¶¶ 10, 38. We are bound to follow the prior opinions of this court absent compelling reasons to reject them, which are not present here. *See Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974). Therefore, we are required to affirm the trial court and need not address the merits of Delmastro's arguments further.

Disposition

¶8 For the foregoing reasons, we affirm. Bank of Arizona has requested an award of attorney fees and costs on appeal pursuant to A.R.S. §§ 33-995(E), 33-998(B), and 33-420. We grant the request, pending its compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge